82-1542

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

JAMES HEWITT, ET AL.,

PETITIONERS

V.

W.L. STRICKLAND, ET AL.,

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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THE ISSUES PRESENTED BY THIS PETITION:

I. Does the principle of comity set out by the Supreme Court in Fair Assessment in Real Est. Assoc v. McNary, 102 S.Ct. 177 bar a property owner from asserting against local taxing officials a complaint for money damages in which the adequacy of a state remedy for the claimed constitutional violations are at issue because: the available state remedies are claimed to be:

A. Inadequate as a matter of law

B. Inadequate because the taxing officials have intentionally and systematically ignored the state remedy and treated plaintiffs in a discriminatory and unfair manner?

II. In a Civil Rights Action for damages against local taxing officials based on discriminatory tax assessments, can the defendants' attorney's fees be taxed against plaintiffs and/or their attorney on the ground that the action is frivolous. unreasonable and without foundation when four Justices of the U.S. Supreme Court find during the pendency of subject act-

ion that such an action should be allowed and the doctrine of comity should not bar such action even when an adequate state remedy is provided?

III. Can an award of attorney's fees to defendants in a Civil Rights Action which was entered by the district judge on the basis of 42 U.S.C. 1988 that the claim was frivolous, unreasonable and without foundation, and under 28 U.S.C.1927 that the proceedings in the action were unreasonably and vexatiously multiplied by counsel properly be affirmed by a Circuit Court of Appeals because of the "inherent power of the (district) court to tax attorneys' fees against counsel who wilfully abuse the judicial process", without any claim having been made in the district court and without any hearing, notice or opportunity of such counsel to respond to such claim that he wilfully abused the judicial process and without any finding by the trial court that counsel did wilfully abuse legal processes?

IV. Can a U.S. District Judge in a Civil Rights Action award attorneys fees to the defendants :

A. against the plaintiffs without a hearing or inquiry having been held by the court and without any findings of fact by the court as to whether the action was frivolous, unreasonable and without foundation as contended by the defendants?

B. against plaintiffs' attorney personally without notice or a hearing afforded and without having plaintiffs' attorney made a party to the action and without findings of fact as to whether the action was frivolous, unreasonable and without foundation?

V. Can a U.S. District Judge in a Civil Rights Action award attorneys' fees to the defendants against plaintiffs on the basis that they have vexatiously and unreasonably multiplied the proceedings in the action by virtue of 28 U.S.C. 1927? -or-

A. award such fees against plaintiffs' attorney without notice, hearing or opportunity to respond and without findings of fact to support the conclusion that the proceedings were unreasonable & vexatiously multiplied? -or-

B. award such fees against plaintiffs or their counsel when the court finds

that the action is barred by a judgment of dismissal of a separate and distinct action between other parties on the basis that the court had no jurisdiction to entertain the prior action?

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

THE PETITIONERS, JAMES HEWITT, et al being the plaintiffs in Case No. 82-8231 in the Eleventh Circuit Court of Appeals, and their attorney, MARSON G. DUNAWAY JR. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Eleventh Circuit Court of Appeals in this case of September 28,1982 in which rehearing was denied November 18, 1982, and in which on February 17, 1983,

Justice Lewis F. Powell, entered his order extending the time to file this petition for certiorari to and including the 18th day of March, 1983.
All of the petitioners herein are named at page one (1) of the Appendix.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District Court for the Newnan Division, Northern District of Georgia appears @ pages 2 & 8 of the Appendix, is not reported

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on September 28, 1982. A timely petition for rehearing en banc was denied on November 18, 1982 and on the 17th day of February, 1983, Justice Lewis F. Powell extended the time within which a petition for certiorari may be filed to & including March 18, 1983. This court's jurisdiction is invoked under 28 U.S.C. 1254 (1) and the trial court's jurisdiction was invoked under 28 U.S.C. 1343 (3).

STATUTORY PROVISIONS INVOLVED

(These statutes are set out verbatim in the Appendix hereto.)

United States Code, Title 28:

Sections 1341, 1343(3) and 1927.

United States Code, Title 42:

Sections 1983 and 1988.

STATEMENT OF THE CASE

Petitioners brought their complaint in District Court, as authorized by Civil Rights Statute, 42 U.S.C. 1983, against the Georgia State Revenue Commissioner for injunctive relief and against local taxing officials of Spalding County, Ga., for money damages resulting from petitioners' alleged deprivation of their federal constitutional rights to equal protection of law and due process of law. The complaint alleged systematic and persistent violation of the taxing laws of Georgia by defendants, and alleged that they had no adequate remedy for their complaint under State Law.

The District Court entered its final order on Feb. 1, 1982, granting respondents' Motions to Dismiss because of 28

U.S.C. 1341, the Tax Injunction Act and because of the decision of this Court in

Fair Assessment etc v. McNary,
102 Supreme Ct. 177

and awarded attorney's fees to defendants against petitioners, under 42 U.S.C. 1988 and 28 U.S.C. 1927, and against their attorney under 28 U.S.C. 1927, without any opportunity for a hearing and without a finding of specific facts. By Order of April 1, 1982, the District Court denied petitioner's Motion to Alter or Amend the Order and Judgment, and entered an Order specifying the amount of attorney's fees awarded to defendants.

Petitioners appealed to the U.S. Court of Appeals for the 11th Circuit, asserting that the District Court abused its discretion in awarding attorney's fees against them and their attorney without a hearing or any inquiry and without specific findings of facts to support its conclusion that the claim was "frivolous, unreasonable and without foundation" under 42 U.S.C. 1988, and that such decision was contrary to law. Petitioners further app-

ealed the imposition of attorney's fees against themselves and their counsel under 28 U.S.C. 1927 for multiplying the proceedings.

The dismissal of their complaint because of an adequate remedy under State law was also appealed.

The Court of Appeals for the Eleventh Circuit affirmed the dismissal of the complaint and the imposition of attorney's fees against petitioners. The Circuit Court gave plaintiffs' attorney the benefit of an appeal, and affirmed the award of defendants' attorney's fees against him, not under 42 U.S.C. 1988, or 28 U.S.C. 1927, but "under the inherent power of the District Court to tax attorney's fees against counsel who wilfully abuse the judicial process."

There was nothing in the findings or order of the District Court with reference to any "wilful abuse of the judicial process" by petitioner's counsel and the District Court did not base the award on its "inherent power" to tax attorney's fees.

Petitioners filed their Petition for Rehearing and Suggesting En Banc consideration, which was denied on November 18, 1982

by the 11th Circuit Court of Appeals. Justice Lewis F. Powell, on February 16, 1983 entered an order extending the time for filing a petition for certiorari to March 18, 1983.

REASONS FOR GRANTING THE WRIT

I. This Court held that taxpayers are barred by the principle of comity from asserting Sect. 1983 actions against the validity of state tax systems in federal courts where the adequacy of the State remedies provided are not at issue in:

FAIR ASSESSMENT etc v. McNary
102 Supreme Ct 177 (1981)

The Eleventh Circuit Court's decision in this case has extended the scope of the principle set out in FAIR ASSESSMENT to bar taxpayers from access to federal courts to protect their federal rights even where the State remedies are attacked as not being "plain, speedy and complete".

Petitioners submit that such extension is contrary to the intention of this Court as indicated by the decision of this Court in MITCHUM v. FOSTER, 407 U.S. 225

" The very purpose of 1983 was to inter-

pose the federal courts between the States and the people, as guardians of the peoples' federal rights-- to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial.' "

The decision sought to be reviewed is also contrary to this Court's intention not to remit taxpayers to state court remedies where their federal rights will not be adequately protected, as indicated in the FAIR ASSESSMENT case language: "....plaintiffs seeking protection of federal rights in federal courts should be remitted to their state remedies if their federal rights will not thereby be lost."

The writ should be granted here and the unwarranted extension of the principle of comity terminated before it is perpetuated in the Eleventh Circuit and adopted in other circuits.

2. The decision sought to be reviewed affirms the award of attorney's fees in a Civil Rights Action to defendants on the ground that the action was frivolous, unreasonable and unfounded in spite of the

opinion of four Justices of this Court entered in the FAIR ASSESSMENT case during the pendency of this case that such an action should not be subject to application of the doctrine of comity. The affirmance of the award of such fees would be equivalent to a finding that the opinion of the four dissenting Justices of this Court was also unreasonable and unfounded and would surely discourage plaintiffs from bringing 1983 claims whose outcome is not certain and thus negate the overriding purpose of the Civil Rights Act to encourage the private enforcement of civil rights laws in order to fully vindicate the federal rights involved.

3. The decision of the 11th Circuit sought to be reviewed constitutes an invasion by that appellate court of the fact-finding function of the trial court, in that while the district court imposed the attorney's fees against counsel for appellants personally upon the basis of 28 U.S.C. 1927 , yet the appellate court found that they were properly imposed because of the inherent power of the trial court to do so

where counsel has wilfully abused the judicial process. We submit that clearly the question as to whether counsel wilfully abused the legal and judicial process in a case is an issue of fact which must be considered by the court in which the process was entered and a judgment of the appellate court based on such a finding made by it is clearly erroneous and should be corrected by this Court so that the clearly delineated functions of trial courts and appellate courts will be maintained.

4. The decision of the 11th Circuit sought to be reviewed here is directly contrary to the principle pronounced by this Court in the case of

CHRISTIANBURG GARMENT CO. V. EQUAL EMPLOYMENT COMMISSION, 98 Supreme Court 694 (1978)

that the trial court must hold an inquiry & make findings of fact that support a conclusion that the claim was void of arguable merit or factual support before attorney's fees may be imposed under 42 U.S.C. 1988..

The decision and judgment of the 11th Circuit complained of also violates the further principle of this court set out in

holding that 42 U.S.C. 1988 authorizes fee awards against unsuccessful parties, and not their attorneys. The decisions of the 11th Circuit on this point should be made to conform to the decisions of this Court.

5. The decision of the 11th Circuit Court sought to be reviewed here is in direct conflict with the principle stated by this Court in the ROADWAY case that while under 28 U.S.C. 1927 there may be assessed against plaintiffs' attorneys the "excess costs" generated by their unreasonable and vexatious conduct, those "excess costs" cannot include attorney's fees for the opposing party. The decisions of the 11th Circuit on this point should be made to conform to the decisions of this Court.

6. We submit that the award of attorney's fees under the inherent power of the court to punish counsel who has wilfully abused the judicial process is for the benefit of the court and public and such fees may not properly be given to enrich or reward the opposing party.

7. The trial and Circuit courts both found this action to be unfounded and vexatious and thus awarded attorney's fees to the defendants against plaintiffs and their counsel because a prior action between most of the same plaintiffs and against most of the same defendants had been dismissed and the dismissal affirmed because of a lack of jurisdiction. Counsel for petitioners explained in affidavits in the record that the complaint here had been drawn and filed in order to supply the facts showing jurisdiction in this case and in order to secure a judgment on the merits of the controversey that could be reviewed by this Court on certiorari.

Petitioners submit that the ruling in Moss v. State of Georgia, 655 Fed 2 668 that it should be dismissed on jurisdictional grounds because it was a suit for a tax refund did not warrant or justify the imposition of attorney's fees in this case against plaintiffs or their counsel, but that the present complaint had at least arguable merit and was not unfounded.

C O N C L U S I O N

For these reasons, a writ of certiorari should issue to review the judgment & opinion of the Eleventh Circuit Court.

Respectfully Submitted,

CECIL D. FRANKLIN
MARSON G. DUNAWAY, JR.
P.O. Box 269
Rockmart, Georgia, 30153

of Counsel for Petitioners

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NAMES OF INDIVIDUAL PLAINTIFFS

Frances White Adams; Irbin S. Bailey, Jr., Jimmy Bass; Sarah Blanton; Charlie B. Blanton; Martha Blanton; H.F. Blackman, W.G. Bryant; Mrs. Helen S. Bryant; J. Ray Cavender; Bobbie Cavender, Central Georgia Memorials, Inc.; Mrs. Collie Crowder; Joe Crowley, Pearl Crowley; Robert M. Davidson; Estelle H. Davidson; Hubert Dillard; Doris H. Duckworth; Vernon L. Ellison; Shirley H. Ellison; W. Ted Floyd; J.L. Futral, Walter C. Futral; R.E. Goggans; Chester Golden; Boysie Garland; Nona Garland; P.J. Gaston; Joe Griffin; Mrs Martha Hewitt; Herbert H. Hogan; Mrs. W.V. Johnston; Evelyn Kierbow; B.R. Miller; Mrs. Eva Jane McDonald; D.G. McKaughan; Gladys G. McLean; Charles Moss; Emma Jane Moss; Edna H. Olsen; Mrs. Newton Penny; J.Alton Pullin; Mrs. J.Alton Pullin; Henry W. Pullin; H.D. Rivkin; S.H. Rifkin; Bertha Sansom; Dewey Sansom; Sara Stanfield; G. Marion Scott; W.H. Scott; Southern Fruit Distributors, Inc.; Wilson W. Standard; Gertrude O. Standard; Ivan E. Taylor; Howard E. Thompson; Ms. Janie Vickery; B.F. Voljavec; Oscar Waldrop; Wallace A. Wilkins; Ona S. Wilkins; William A. Wood, Jr; Nancy W. Wood; James Hewitt and Marson Dunaway Jr

STATEMENT BY CORPORATIONS UNDER

RULE 28 (1):

Central Georgia Memorials, Inc. has no parent corporation, affilliated or subsidiary corporations.

Southern Fruit Distributors, Inc. has no parent corporation, affilliated or subsidiary corporations.

Order, United States District Court,
Northern District of Georgia Feb. 1, 1982

HEWITT VS. STRICKLAND #C81-126N

--ORDER--

The above-styled civil rights action is before the court on the defendants' motions to dismiss and the plaintiffs' motion to allow amendment to petition. The plaintiffs, taxpayers in Spalding County, Georgia, brought suit seeking injunctive relief and damages against the defendants in connection with the allegedly unconstitutional administration of the ad valorem tax digest in Spalding County, Georgia.

This action bears a striking resemblance to Charles Moss, et al. v. State of Georgia, et al., C80-109N, which was dismissed by this court's order of February 13, 1981 for lack of jurisdiction under the Tax Injunction Act, 28 U.S.C. Sec. 1341. The dismissal was affirmed by the Fifth Circuit on September 11, 1981. Moss v. State of Georgia, 655 F.2d 668, (5th Cir. 1981). On October 29 the plaintiffs filed this action. Sixty-six of

the plaintiffs here were the plaintiffs in Moss; one additional plaintiff appears here and his name is employed in the style. The plaintiffs have named the State Revenue Commissioner instead of the State of Georgia as one defendant in their more recent complaint.

The plaintiffs appear to have filed a photocopy of the complaint in Moss as their complaint in this action, with the amended style as the only major change. Certain minor alterations, such as the substitution of the defendant Hancock for the defendant Barron in Moss, have been made with the use of correcting fluid. Additional paragraphs have been added to this complaint, detailing the plaintiffs' successful challenge to the tax digest in the Spalding County Superior Court, and its aftermath. These allegations are essentially identical to an amendment which the plaintiffs unsuccessfully attempted to file with the Fifth Circuit in Moss.

As already discussed in this court's order and the Fifth Circuit's opinion in Moss, the Tax Injunction Act, 28 U.S.C. § 1341, bars this action. The plaintiffs'

contention that this suit differs from their previous effort in that it does not seek a refund of taxes is without merit:

> The fact the action was brought under 42 U.S.C.A. § 1983 does not preclude the application of the Tax Injunction Act. See Bland v. McHann, supra, 463 F. 2d at 24-25. Even if we accept plaintiffs' argument that this is a damage suit, not a refund suit, the reasoning of our prior cases would require the same result as that reached in the clearly labeled "refund suits." In A Bonding Co. v. Sunnick, 629 F.2d 1127, 1133 (5th Cir. 1980), we held that § 1341 bars a § 1983 suit seeking damages on the basis of an unconstitutional tax, because the suit "would have many of the same detrimental effects that actions for tax refund, declaratory, or injunctive relief would have."
>
> Moss v. State of Georgia, 655 F.2d 668, 669 (5th Cir. 1981)

The plaintiffs' elaboration of their original complaint with an account of certain successful state court litigation does not change this result. As the Fifth Circuit observed of this material:

> In any event, the amendments, which only further allege this action is not barred by the Tax Injunction Act and that Georgia has failed to provide a plain, speedy and efficient remedy, would not affect the decision here, required by prior holdings of this Court.
>
> 655 F.2d at 670.

In addition, the recent United States Supreme Court decision in Fair Assessment in Real Estate Association, Inc. v. McNary, 50 U.S.L.W. 4017 (1981), holds that taxpayers are barred by the principle of comity from asserting § 1983 actions to redress allegedly inconstitutional administration of a state tax system, independently of the Tax Injunction Act.

Accordingly, the motion of the defendant Strickland to dismiss and the motion of the defendants Smith, Mixon,

Hancock, Thomas, Goolsby and Martin to dismiss are granted and sustained on the common ground of lack of jurisdiction. In light of these dismissals, the plaintiffs' motion to amend their complaint to add as defendants the sheriff and tax commissioner of Spalding County is denied as moot.

The defendants have prayed for an award of attorney's fees under 42 U.S.C. § 1988. Attorney's fees are not awarded to the prevailing defendant under § 1988 as a matter of course, but only when the plaintiff's claim is "frivolous, unreasonable, or without foundation. "Dayan v. Board of Regents, 620 F.2d 107 (5th Cir 1980). The plaintiffs' quest for relief in the state courts has met with considerable success, but this action was nevertheless filed in virtual duplication of an action previously dismissed by this court and affirmed by the Fifth Circuit only forty-eight days before, reasserting the claims decided adversely to the plaintiffs in that action.

In light of these facts, the court finds that the plaintiffs and plaintiffs'

counsel have asserted claims that are frivolous, unreasonable and without foundation, and that the defendants are entitled to an award of reasonable attorney's fees in this action. In addition, it appearing to the court that plaintiffs and plaintiffs' counsel have unreasonably and vexatiously multiplied the proceedings in this action, the court directs under the authority of 28 U.S.C. § 1927 that attorney's fees also be awarded against plaintiffs' counsel personally.

Counsel for the defendants are hereby instructed to submit an affidavit within fifteen (15) days of the date of this order itemizing the number of hours spend in this litigation, the types of services performed during this time and the suggested hourly rate. After an examination of the affidavit, the court will make a determination of the amount of attorney's fees to be awarded.

SO ORDERED, this 1 day of February, 1982.

/s/
G. ERNEST TIDWELL
JUDGE, UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

James Hewitt, et al., Plaintiffs

vs.

W.E. Strickland, State Revenue Commissioner, et al., Defendants

Civil Action No. C81-126N

ORDER

The above-styled civil action is before the court on the plaintiffs' "motion to alter or amend order and judgment", which will be treated as a motion for reconsideration of this court's order of February 1, 1982. The plaintiffs have presented no authority or argument warranting a change in that decision. Despite the plaintiffs' contentions to the contrary, the law of this circuit was clear at the time the action was commenced. The filing of a second complaint, virtually identical to the complaint in an earlier action, immediately after affirmance of dismissal of that earlier action on all grounds set forth by the plaintiffs in both complaints, is clearly frivolous and justifies both dismissal

and the award of attorney's fees under 42 U.S.C. § 1988.

On February 1, 1982, this court awarded reasonable attorney's fees to the defendants in this action, and directed that counsel for the defendants submit affidavits for a determination of the amount of attorney's fees to be awarded. Following the consideration of these affidavits, the court makes the following determination.

In fixing the amount of the awards, the court will consider the factors outlined in Johnson v. Georgia Highway Express, Inc., 488 F2d 714, 717-719 (5th Cir. 1974), in the order prescribed by In re First Colonial Corp., 544 F.2d 1291, 1298 (5th Cir.), cert. denied, 431 U.S. 904 (1977). See Fitzpatrick v. IRS,665 F.2d 327, 331 (11th Cir. 1982).

First, the court must "ascertain the nature and extent of the services supplied by the attorney." First Colonial, supra, at 1299. As this action was decided on motions to dismiss, the number of hours submitted by defendants' counsel is relatively low, involving primarily review

of the plaintiffs' contentions, comparison of the complaint with a previous, similar claim, and research and preparation of the motions to dismiss. A recent United States Supreme Court decision in the defendants' favor necessitated filing of supplemental briefs after the original motions to dismiss.

The private defendants in this action were represented by the law firm of Neely & Player, while the State Revenue Commissioner was represented by the Attorney General's office. The services rendered by these attorneys varied to some extent. For example, two assistant attorneys general were involved in this action, while the services supplied to the private defendants were performed by one attorney. One motion by the plaintiffs was directed solely to the defendant Revenue Commissioner. In light of these considerations, the court finds that the 24.6 hours claimed by Assistant Attorneys General Bumgartner and Wood in defending this action reasonably reflect the services provided and will be allowed.

The attorney for the private defendants also represented these defendants in a

previous, similar action filed by these plaintiffs, and relied to some extent on the services already performed in connection with the earlier litigation. For example, counsel attached the defendants' brief in the Fifth Circuit on appeal of the previous action to the defendants' brief in support of their motion to dismiss, rather than restating those arguments in a new memorandum. In consequence, counsel for the private defendants has requested compensation for significantly less time than counsel for the defendant Revenue Commissioner. The court finds that the 12.4 hours claimed by Mr. Winborne of Neely & Player reasonably reflect the services provided and will be allowed.

The court must next consider the value of the services rendered by counsel, taking into account the customary fee in the area, the quality of the work produced, and special experience or expertise, or lack thereof. Fitzpatrick, supra,665 F.2d at 332. The $50 hourly rate of compensation requested by counsel for the private defendants is commensurate with the rates customarily charged in this district for

the defense of civil suits, and in light of counsel's eight and one-half years of experience in the practice of law is a reasonable hourly rate. The fee was fixed rather than contingent, and the attorney expected compensation at the rate of $50 per hour. The quality of counsel's work amply justifies compensation at this rate.

The plaintiffs assert that the assistant attorneys general, as employees of the state, merit a lower rate of compensation than private attorneys. The plaintiffs have cited no authority for this contention and it is not supported by the relevant case law. See, e.g., Church of Scientology v. Cazares, 638 F.2d 1272, 1291 (5th Cir. 1981), citing Perez v. Rodriquez Bou, 575 F.2d 21 (1st Cir. 1978). The quality of the work submitted by the assistant attorneys general is high. However, in view of their relative inexperience, both having joined their office in 1979, the court finds that compensation at the hourly rate of $40, rather than the $60 requested, is appropriate. The question of fee

arrangement has no relevance to the assistant attorneys general.

After reaching the nominal fees for counsel through the method used above, the court must next examine the remaining Johnson factors and briefly articulate how each affects the final compensation. Fitzpatrick, supra, 665 E2d at 332. Several factors, such as the preclusion of other employment, the time limitations imposed on the attorney, and the "undesirability" of the case, have little application to the relatively uncommon award of attorney's fees to a prevailing defendant. The nature and length of the professional relationship with the client is inapplicable to the Attorney General's representation of the private defendants in this action was discussed and taken into account in connection with the reduced amount of time claimed by counsel, above.

The novelty and difficulty of the questions presented in this action must be addressed. The substantive law upon which the motion to dismiss was decided is relatively clear and straightforward, particularly in light of recent Fifth

Circuit affirmance of dismissal of a nearly identical complaint. Accordingly, this factor does not justify enhancement of the defendants' award. However, the circumstances presented by this action are not so common that preparation of the necessary pleadings and briefs would be a matter of routine, and therefore a reduction in the award is not justified.

In considering the amount involved and the results obtained, the court notes that the complaint prayed for damages of nearly $25,000 and far-reaching injunctive relief, and that the defendants obtained the result they sought, i.e. dismissal of the action. Accordingly, this factor does not call for a reduction in the defendants' award.

The relative infrequency of attorney's fees awards to a prevailing defendant makes a comparison with awards in similar cases somewhat difficult, particularly in view of the many factors to be considered in making an award. However, in the circumstances of this case, including the approval of the time spent in preparation by counsel, the determination of

the customary rate in the district, and the adjustment of the rate according to counsel's experience, the court is satisfied that the award in this case does not vary substantially from awards made in similar cases.

The last matter to be considered is the question of the expenses requested by counsel for the private defendants. In Dunten v. Kibler, 518 F. Supp. 1146, 1155 (N.D. Ga. 1981), Judge Edenfield addressed the issue of award of expenses under § 1988. Using the standard of Loewen v. Turnipseed, 505 F. Supp. 512, 517 (N.D. Miss. 1980), the court determined that "an award of out-of-pocket expenses should be limited to those expenses which an attorney would normally, customarily and routinely bill to a fee-paying client." 518 F. Supp. at 1156. Counsel for the private defendants has submitted with his affidavit in support of attorney's fees and expenses a copy of the computer print-out of time and expenses generated in the course of his firm's regularly conducted business as attorneys. This computer print-out records as billed to the client

the $65.74 in expenses requested. Accordingly, these expenses come within the restrictions of Dunten v. Kibler, supra, and should be allowed.

Therefore, the court grants the defendants' petition for costs and attorney's fees in the following amounts:

ATTORNEYS FOR DEFENDANT STATE REVENUE COMMISSIONER:

John E. Bumgartner, 19.6 hours at $40 per hour	$784.00
William B. Wood, 5.0 hours at $40 per hour	$200.00
	$984.00

ATTORNEY FOR DEFENDANTS SMITH, MIXON, BARRON, THOMAS, GOOLSBY AND MARTIN:

John W. Winborne, III, 12.4 hours at $50 per hour	$620.00
Expenses incurred	$ 65.74
	$685.74
TOTAL	$1,669.74

The court therefore directs the clerk to enter judgment for the defendants against all the plaintiffs and plaintiffs' attorney, jointly and severally, in the amount of $1,669.74.

SO ORDERED, this 1 day of April, 1982.

/s/
G. ERNEST TIDWELL
JUDGE, UNITED STATES
DISTRICT COURT

Order, United States Court of Appeals For the Eleventh Circuit, September 28, 1982. HEWITT, V. STRICKLAND, NO. 82-8231

ORDER

PER CURIAM:

The district court was correct in dismissing the plaintiffs' complaint for want of subject matter jurisdiction: their claim was barred by the Tax Injunction Act, 28 U.S.C. § 1341, and comity, Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 102 S.Ct. 177,70 L.Ed2 271(1981).

The district court did not abuse its discretion in awarding attorneys' fees against the plaintiffs because their claim against the defendants was frivolous and was brought and prosecuted in bad faith. The court correctly applied the law governing the method of calculating such fees, and the record supports the amount awarded. We note that the notice of appeal does not indicate that plaintiffs' attorney appealed the award of attorneys' fees assessed against him. Giving plaintiffs' attorney the benefit of an appeal nevertheless, we affirm the district court's

award of fees against him under the inherent power of the district court to tax attorneys' fees against counsel who wilfully abuse the judicial process, something plaintiffs' attorney did in this case by filing and prosecuting the complaint now before us.

AFFIRMED.

Order, United States Court of Appeals for the Eleventh Circuit, November 18, 1982. HEWITT V. STRICKLAND, NO. 82-8231.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Tjoflat
United States Circuit Judge

SUPREME COURT OF THE UNITED STATES

No.A-696

JAMES HEWITT, ET AL.,

Petitioners

V.

W.R. STRICKLAND, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioners, IT IS ORDERED that the time for filing a petition for writ of certiorari in the above entitled cause be, and the same is hereby, extended to and including March 18, 1983.

S/ Lewis F. Powell
Associate Justice of
the Supreme Court of
The United States

Dated this 17th day of February, 1983.

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Chapter 28 United States Code:

Sect. 1927: " Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct."

Sect. 1341: " The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of said State."

Sect. 1343 (3) " The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person...to redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

United States Code Chapter 42:

Sect. 1983

" Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. "

Sect. 1988

" In any action or proceeding to enforce Sect. 1983 and other civil rights statutes the court, in its discretion, may allow the prevailing party.. reasonable attorney's fee as part of the costs."

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No. 82-1542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES HEWITT, et al.,

Petitioners,

v.

W. E. STRICKLAND, WAYNE SMITH, BILLY MIXON, BILLY HANCOCK, FRANK THOMAS, JIM GOOLSBY and RUTH MARTIN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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April 18, 1983

QUESTIONS PRESENTED

1. Whether Georgia's tax remedies are "plain, speedy and efficient" with the result that Petitioners' § 1983 action against the State Revenue Commissioner and local tax officials is barred by the Tax Injunction Act, 28 U.S.C. § 1341?

2. Whether Georgia's tax remedies are "plain, adequate and complete" with the result that Petitioners' § 1983 action against the State Revenue Commissioner and local tax officials is barred by the principle of comity?

3. Whether Petitioners' § 1983 action against the State Revenue Commissioner and local tax officials was "frivolous, unreasonable and without foundation" with the result that attorney's fees could be awarded to the State Revenue Commissioner and local tax officials under the authority of 42 U.S.C. § 1988?

4. Did the attorney for Petitioners fail to appeal the judgment against him with the result that the question of the validity of the assessment of attorney's fees against him is not before this Court?

5. Assuming, *arguendo*, that Petitioners' attorney properly appealed the judgment against him in the district court and properly applied for certiorari in this Court, were his actions in filing the present litigation such that attorney's fees were properly assessed against him under either the inherent powers of the district court or under 42 U.S.C. § 1927?

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JAMES HEWITT, et al.,

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATEMENT OF THE CASE

I.

PROCEEDINGS BELOW

James Hewitt and other taxpayers from Spalding County, Georgia (hereinafter referred to collectively as the "Petitioners") filed their Complaint in the United States District Court for the Northern District of Georgia, Newnan Division, against the Revenue Commissioner of the State of Georgia and six named individuals who comprise the Board of Tax Assessors and Board of Commissioners of that county (said individual county officials hereinafter collectively referred to as the "Tax

Officials"). Petitioners' Complaint, based upon alleged violations of their constitutional rights, sought temporary and permanent injunctions, attorneys' fees and expenses incurred in successful ad valorem taxation challenges in the state courts, and attorneys' fees and costs for the lawsuit in the district court. The Revenue Commissioner filed a Motion to Dismiss on the grounds of lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, *res judicata* and collateral estoppel. The Tax Officials filed a Motion to Dismiss for lack of subject matter jurisdiction. All defendants prayed in their original responses that, upon dismissal of the complaint, attorney's fees be awarded under 42 U.S.C. § 1988.

On February 2, 1982 the district court entered an order which found that the Petitioners' Complaint was barred both by the Tax Injunction Act, 28 U.S.C. § 1341, and by the principle of comity. That order also found that "the plaintiffs and plaintiffs' counsel have asserted claims that are frivolous, unreasonable and without foundation, and that the defendants are entitled to an award of reasonable attorney's fees in this action." The order also stated that attorney's fees would be assessed against Petitioners' counsel personally under the authority of 28 U.S.C. § 1927. Counsel for the Revenue Commissioner and the Tax Officials were given fifteen days to submit affidavits itemizing the number of hours spent in litigation, the type of services performed, and the suggested hourly rate. The Petitioners then filed a Motion to Alter and Amend Order & Judgment. Counsel for Petitioners filed an unsigned and unsworn affidavit in support of that motion.

Counsel for the various defendants filed affidavits con-

cerning attorney's fees as required by the Order of February 2, 1982. Then, Petitioners filed a response to the affidavit of the Revenue Commissioner, a brief in support thereof, and an affidavit expressing counsel's own opinions concerning the work needed to defend the action brought by Petitioners. No response was made to the affidavit filed by counsel for the Tax Officials.

On April 2, 1982, the Court's order denying reconsideration and setting the amount of attorneys' fees to be awarded was entered. That order made detailed findings concerning the factors outlined in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974) and awarded against Petitioners and Petitioners' counsel $984.00 in attorney's fees for the Revenue Commissioner and $685.74 in attorney's fees and expenses for the Tax Officials. Judgment was entered on April 5, 1982 against both Petitioners and their counsel personally. Notice of Appeal and an Appeal Bond on behalf of Petitioners were filed on April 8, 1982. Counsel for Petitioners did not appeal and did not file a personal appeal bond.

On Sept ..ber 28, 1982, the United States Court of Appeals for the Eleventh Circuit affirmed the judgments and rulings of the district court. A Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Eleventh Circuit on November 18, 1982.

II.

STATEMENT OF FACTS

The only "facts" relevant to the issue of the propriety of the dismissal of Petitioners' complaint are the Georgia laws dealing with the assessment of property taxes, the alleged violations of Petitioners' constitutional rights and the nature of the relief sought by the Petitioners.

The relevant Georgia statutes are Off. Code of Ga. Ann. §§ 48-5-271, 48-5-306 and 48-5-311 (1981) [Ga. Code Ann. §§ 91A-1413, 1448 and 1449 (1933)]. These statutes set forth the procedures with respect to the assessment of property taxes and challenges to any such assessments. The purported constitutional violations deal with alleged unequal treatment of ad valorem taxes with respect to persons or entities who make their returns to local (county) tax officials, on the one hand, as compared to persons or entities whose returns are made to the State Revenue Commissioner, on the other hand; due process violations were also alleged. Among the contended due process violations were the alleged failure of the Tax Officials to comply with the orders of the Superior Court of Spalding County, Georgia, lack of qualified appraisers as required by Georgia law and lack of procedural safeguards at one administrative level, the Board of Equalization. The types of relief sought by Petitioners in their complaint were temporary and permanent injunctions, damages in the nature of attorney's fees and expenses incurred in appealing administrative decisions to the Superior Court of Spalding County, Georgia and the attorney's fees and costs of Petitioners' action in federal court.

Significantly, Petitioners' complaint contains numerous references as to how they were successful in obtaining relief for their complaints from the Superior Court of Spalding County, Georgia.

The relevant facts with respect to the district court's awarding attorney's fees and expenses to the Revenue Commissioner and the Tax Officials consist almost exclusively of a comparison of the complaint filed in the case at bar with Petitioners' complaint brought in the name of Charles Moss in September 1980 and the amend-

ment offered to that lawsuit while it was on appeal to the Fifth Circuit. The first nine paragraphs of the complaint in this action consist of photocopies of most of the prior complaint. The tenth paragraphs are identical with the exception of twelve words inserted in the newer complaint. Many of the remaining paragraphs of the new complaint merely paraphrase paragraphs contained in the amendment offered on appeal in the previous suit. That suit did not seek injunctive relief but prayed for damages in the amount of "excessive and exhorbitant taxes" paid by Petitioners over a period of twenty years plus $21,000.00 in legal fees and court expenses "to enforce their federal constitutional rights" in the state courts. The Honorable G. Ernest Tidwell, United States District Judge, dismissed the first complaint under 42 U.S.C. § 1341 in an Order dated February 13, 1981. That dismissal was appealed to the Fifth Circuit in which Petitioners offered an amendment to the complaint, which amendment contains many of the allegations found in the present lawsuit. On September 11, 1981 the Fifth Circuit affirmed the lower court's judgment and, while not allowing the proffered amendment, specifically stated that said amendment "would not affect the decision here, required by prior holdings of this Court." *Moss v. State of Georgia*, 655 F.2d 668, 670 (5th Cir. 1981). Then, only *forty-eight* days after the Fifth Circuit's opinion the present lawsuit was filed.

The facts relevant to the issue of the amount of attorney's fees awarded to the defendants were contained in affidavits of counsel for the Revenue Commissioner and Tax Officials and the opposing affidavits and responses filed by Petitioners. In summary, counsel for the Revenue Commissioner and counsel for the Tax Officials swore to their experience, the type of work performed, the

amount of time spent on the work, and the rates per hour requested. The response filed by Petitioners against the evidence submitted by the Revenue Commissioner argued that the Revenue Commissioner's counsel (and apparently these Tax Officials' counsel) "had already performed the research required in this case in order to respond to the *Moss* Complaint except for the minimal research required in relation to his application contained therein for award of attorney's fees."

SUMMARY OF ARGUMENT

Petitioners filed their lawsuit under 42 U.S.C. § 1983 against various tax officials and prayed for injunctive relief, attorneys' fees and expenses for prior actions in state courts and attorneys' fees and costs in the federal court. Georgia's remedies available to taxpayers such as Petitioners are both "plain, speedy and efficient" and "plain, adequate and complete" with the result that Petitioners' action was barred by the Tax Injunction Act, 28 U.S.C. § 1341, and the principle of comity.

Petitioners' lawsuit was filed a mere forty-eight days after the Fifth Circuit had affirmed the dismissal of a virtually identical lawsuit filed by sixty-six of the sixty-seven Petitioners in the case at bar. Under these facts and in light of prior opinions of this Court with respect to the remedies sought by Petitioners, the filing of the instant litigation was clearly "frivolous, unreasonable and without foundation" with the result that attorneys' fees were properly assessed against Petitioners.

Petitioners' counsel, who purports to be an additional Petitioner in this Court, did not join in the appeal from the judgment of the district court to the court of appeals and, accordingly, he is not a proper Petitioner in this

Court. Assuming, *arguendo*, that Petitioner's counsel is a proper Petitioner in the case at bar, his actions in filing the second § 1983 action against the Revenue Commissioner and Tax Officials authorized the award of attorneys' fees against him both under 28 U.S.C. § 1927 because he unreasonably and vexatiously multiplied the proceedings and under the inherent power of the district court because the filing of the second complaint constituted a wilful abuse of the judicial process.

ARGUMENT AND CITATION OF AUTHORITY

Rule 17.1 of this Court sets forth examples of those types of cases for which the granting of ceriorari might be appropriate. The case at bar does not fit even remotely any of the examples set forth in that Rule. To the contrary, the purported issues set forth by Petitioners raise no questions which have not previously been answered by this Court and various courts of appeal; furthermore, the decisions rendered by the district court and the federal court of appeals in the case at bar follow both the letter and the intent of prior decisions of this Court.

I.

PETITIONERS' ACTION IS BARRED BY BOTH THE TAX INJUNCTION ACT AND THE PRINCIPLE OF COMITY.

The Tax Injunction Act, 42 U.S.C. § 1341, forbids a district court to "enjoin, suspend or restrain the assessment, levy or collection" of any state taxes when that particular state's laws provide "a plain, speedy and efficient remedy in the courts of that state." *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981). The *Rosewell* case also held that the inability to obtain interest on

refunds for taxes which had been paid under protest over two years before did not render Illinois' remedy less than "plain, speedy and efficient." *Id.* at 528. *A fortiorari*, the inability to obtain attorneys' fees and expenses (the only relief other than injunctive relief sought by Petitioners), to which there is no inherent right in the American system of jurisprudence in the absence of statute or inherent power of a court, would not render the Georgia statutory scheme for challenging taxes less than "plain, speedy and efficient."

Federal lawsuits by taxpayers seeking monetary damages against tax officials are barred by the principle of comity if state remedies are "plain, adequate and complete." *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, ___ U.S. ___, 102 S. Ct. 177 (1981).[1] Furthermore, the words "plain, speedy and efficient" for purposes of applying the Tax Injunction Act will have the same meaning as "plain, adequate and complete" for the purpose of applying the principle of comity and federal court decisions which have treated the adequacy of state remedies for the purpose of the Tax Injunction Act are proper authority for applying the principle of comity. 102 S. Ct. at 186, n. 8.

Several federal decisions have held that Georgia provides a "plain, speedy and efficient remedy" by which taxpayers might challenge the assessment of ad valorem taxes. *Moss v. State of Georgia*, 655 F.2d 668 (5th Cir. 1981); *Adams v. Smith*, 415 F. Supp. 787 (N.D. Ga. 1976), *aff'd*, 568 F.2d 1232 (5th Cir. 1978); *see also, Kiker v.*

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[1] *Fair Assessment* did not decide whether or not the Tax Injunction Act barred such suits for damages against tax officials; however, such a holding has been made in the Fifth Circuit in Bland v. McHann, 463 F.2d 21 (5th Cir. 1972).

Hefner, 409 F.2d 1067 (5th Cir. 1969). These federal decisions are fully in accord with the decisions of this Court. In *Rosewell*, this Court held that the "plain, speedy and efficient" language requires "certain minimal *procedural* criteria." 450 U.S. at 512 (emphasis in original). The remedies must provide a "full hearing and judicial determination" at which the taxpayers might raise any constitutional objections which they might have. *Id.* at 514 (quoting *LaSalle National Bank v. County of Cook*, 51 Ill. 2d 318, 324, 312 N.E.2d 252, 255-256 (1974)).[2]

The Petitioners argue, without citations of authority, that if their 42 U.S.C. § 1983 action is not pemitted in federal court, they will forever lose their rights to seek redress for the many alleged constitutional violations. The simple answer to this "catch-all" argument is that "[a] civil litigant may, of course, seek review in this [Supreme] Court of any federal claim properly presented in and rejected by state courts." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 605 (1975), as cited in *Fair Assessment*, 102 S. Ct. 177, 186. Furthermore, any arguments Petitioners might make that the Georgia remedy is not "plain, speedy and efficient" or "plain, adequate and complete," are belied by their admissions that they were successful in obtaining relief from their complaints from the Superior Court of Spalding County, Georgia.

In summary, Georgia's remedies available to taxpayers such as Petitioners meet all the requirements set forth by this Court and, accordingly, their § 1983 action in the District Court was barred both by the Tax Injunction Act and the principle of comity.

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[2] *See also* California v. Grace Brethren Church, ___ U.S. ___, 102 S. Ct. 2498, 2509-2510 (1982).

II.

ATTORNEY'S FEES WERE PROPERLY ASSESSED AGAINST PETITIONERS BECAUSE THEIR COMPLAINT IN THE DISTRICT COURT WAS FRIVOLOUS, UNREASONABLE AND WITHOUT FOUNDATION.

In *Hughes v. Rowe*, 449 U.S. 5 (1980) this Court stated that attorneys' fees may be awarded in § 1983 actions if the district court finds "that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 14, quoting *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). Again referring to the *Christianburg Garment Co.* case, this Court noted that the district court might also award attorney's fees if "the plaintiff continued to litigate after it clearly became [frivolous, unreasonable or groundless]." 449 U.S. at 15.

On September 11, 1981 the Fifth Circuit issued its opinion in *Moss v. State of Georgia, supra.* A mere forty-eight days later Petitioners initiated this lawsuit with numerous allegations taken verbatim from the *Moss* complaint and other allegations taken from their proffered amendment in that case. Sixty-six of the sixty-seven Petitioners in this action were plaintiffs in *Moss.* The only person who was not a named plaintiff in *Moss* is James Hewitt, the first named plaintiff in the case at bar.

A comparison of the two complaints shows shocking similarities; the first eleven paragraphs of each are identical and, in fact, the first nine paragraphs of the complaint in this case are a photocopy of the first few pages of the complaint in *Moss.* Any allegations in the present lawsuit which differ from the allegations in the prior lawsuit are either taken from the proffered amendment in

the previous litigation or add nothing whatever of substance to the question of whether or not Petitioners' action is maintainable.[3] Most significant of all, the relief sought in the present litigation, *i.e.* injunctive relief and attorney's fees, is even more clearly prohibited by the Tax Injunction Act and comity.

Faced with these facts, there can be little amazement that the district court specifically found that the claims in the present litigation are "frivolous, unreasonable and without foundation."

Petitioners argue that the district court must hold an inquiry and make findings of fact in support of any conclusion that a claim was void of arguable merit. In the case at bar, the Revenue Commissioner and the Tax Officials moved for attorneys' fees from the outset and, after the district court's order finding that they were entitled to attorneys' fees, submitted detailed affidavits in support of the amount of attorneys' fees. Petitioners submitted numerous responses and affidavits and, only after the filing of those responses and affidavits, did the district court render its detailed order following the criteria set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

The next argument raised by Petitioners is that it was not until the issuance of the opinion in *Fair Assessment*

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[3] In Moss v. State of Georgia, the Fifth Circuit commented as follows concerning the amendments which were proffered in that court:

> In any event, the amendments, which only further allege this action is not barred by the Tax Injunction Act and that Georgia has failed to provide a plain, speedy and efficient remedy, would not affect the decision here, required by prior holdings of this Court.

655 F.2d at 670.

that their theories with respect to the Tax Injunction Act and comity were found lacking by this Court. They also argue that four justices of this Court supported their basic theories. Such arguments are clearly misleading. First, Petitioners' arguments were answered adversely in *Moss v. State of Georgia* and they made no attempt whatever to seek certiorari in that case. Second, Petitioners were faced both with numerous federal court decisions stating that Georgia's remedies were "plain, speedy and efficient" and with this Court's opinion in *Rosewell* which clearly demonstrated that the relief sought in their complaint was barred by the Tax Injunction Act.

In summary, Petitioners' bringing of this action under the circumstances present was not only frivolous, unreasonable and without foundation but was also in bad faith. Furthermore, Petitioners were given more than adequate notice of the intent to recover attorneys' fees and were given ample opportunity to argue the amount of attorneys' fees. While Petitioners chose to submit affidavits in opposition to the attorneys' fees awarded to the Revenue Commissioner, no such responses or affidavits were filed with respect to attorneys' fees awarded to the Tax Officials.

III.

THE AWARDING OF ATTORNEYS' FEES AGAINST PETITIONERS' COUNSEL, MARSON G. DUNAWAY, JR., IS NOT PROPERLY BEFORE THIS COURT.

The judgment of the district court awarded attorneys' fees and expenses "jointly and severally" against Petitioners and their attorney, Marson G. Dunaway, Jr. Petitioners' Notice of Appeal of April 8, 1982 states that only the "plaintiffs" were parties to the appeal and the

appeal bond covered only James Hewitt, the named plaintiff.

Rule 3(c) of the Federal Rules of Appellate Procedure requires that the Notice of Appeal "shall specify the party or parties taking the appeal." The failure to comply with this rule deprived the appellate court of jurisdiction over the alleged appeal of Mr. Dunaway. *Cf. Cook & Sons Equip., Inc. v. Killen*, 277 F.2d 607 (9th Cir. 1960); *Covington v. Allsbrook*, 636 F.2d 63 (4th Cir. 1980).

The reported decisions contain few cases dealing with appeals from judgments for attorneys' fees or costs against counsel; however, those cases list the attorneys as actual appellants. *See, Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Kiefel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1163 (7th Cir. 1968). The opinion of the Eleventh Circuit in this case contains the following:

> We note that the Notice of Appeal does not indicate that Plaintiffs' attorney appealed the award of attorneys' fees assessed against him. Giving plaintiffs' attorney the benefit of an appeal nevertheless, we affirm the district court's award of fees against him . . .

The Tax Officials submit that Mr. Dunaway was not an Appellant in the Eleventh Circuit Court of Appeals and, accordingly, he could not possibly be a Petitioner before this Court. The propriety of this argument is supported by Rule 19.6 of this Court which states, in relevant part, as follows: "All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this court, . . ."

IV.

ASSUMING, ARGUENDO, THAT MR. DUNAWAY IS PROPERLY BEFORE THIS COURT AS A PETITIONER, THE JUDGMENT AGAINST HIM FOR ATTORNEYS' FEES WAS AUTHORIZED BY BOTH 28 U.S.C. § 1927 AND THE INHERENT POWER OF THE DISTRICT COURT.

In *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), this Court dealt with the assessment of attorneys' fees against an attorney in a civil rights action. That decision made it clear that a district court has the inherent power to assess attorneys' fees against an attorney who might "wilfully abuse judicial processes." That same opinion held that 28 U.S.C. § 1927 could not be used to assess attorneys' fees against an attorney who "multiplied the proceedings in any cause . . . so as to increase costs unreasonably and vexatiously." However, 28 U.S.C. § 1927 was amended in September of 1980 to expressly authorize attorneys' fees to be included in the costs that might be assessed against an attorney in the appropriate circumstances.[4]

In the case at bar, the district court made specific findings that Petitioners' attorney, Mr. Dunaway, had "unreasonably and vexatiously multiplied the proceedings in this action," thereby authorizing the assessment of attorneys' fees against Mr. Dunaway under 28 U.S.C. § 1927. The Eleventh Circuit, with the entire record before it, did not deal with 28 U.S.C. § 1927 but found specifically that the award of attorneys' fees against him was proper "under the inherent power of the district court to tax attorneys' fees against counsel who wilfully abuse judicial process, something plaintiffs' attorney did in this case by filing and prosecuting the complaint now before us."

[4] Pub. L. No. 96-349, § 3, 94 Stat. 1156.

CONCLUSION

The procedure set up under Georgia law for challenging the assessment of ad valorem taxes affords Petitioners more than sufficient procedural safeguards to ensure that they may challenge such taxes under the Constitution and laws of the United States. Accordingly, their 42 U.S.C. § 1983 action against the Revenue Commissioner and Tax Officials is barred both by the Tax Injunction Act and the principle of comity. Furthermore, the circumstances surrounding the filing of this second lawsuit and a comparison of this lawsuit with the previous lawsuit brought by Petitioners clearly authorized the awards of attorneys' fees and expenses against Petitioners and their attorney.

All of the rulings of the district court and the appellate court are in accord with the decisions of this Court and this petition for certiorari raises no issues which would warrant review by this Court. For these reasons, the Tax Officials respectfully request that the petition for a writ of certiorari be denied.

NEELY & PLAYER, P.C.

By: _____

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